SPECIAL REPORT

Commonwealth of Massachusetts
HOUSE OF REPRESENTATIVES

HOUSE POST AUDIT AND OVERSIGHT BUREAU

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HOUSE POST AUDIT AND OVERSIGHT COMMITTEE
SPECIAL REPORT

March, 1998

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The House Post Audit and Oversight Bureau (HPAB) has reviewed the recent decision of the Supreme Judicial Court (SJC) in the matter of Electric Mutual Liability Insurance Company (EMLICO). That decision issued on January 5, 1998 ruled that the Commissioner of Insurance had no authority to approve a redomestication of EMLICO to the country of Bermuda. The SJC held that the provisions of MGL c.175 s.49A were limited to states of the United States. Accordingly, the Court ruled that as a matter of law EMLICO never left Massachusetts.

In its Interim Report issued in November of 1997, the House Post Audit and Oversight Bureau had strongly criticized the process by which the Commissioner and the Division had purported to evaluate the restructuring and ultimate redomestication. Given the unequivocal language of the SJC decision, the Bureau believes that the issues raised in the interim report take on added significance.

The Bureau also believes, however, that given the Supreme Judicial Court's decision and the inevitable legal wrangling over jurisdiction with the winding up processes already underway in Bermuda, the urgency of the Bureau moving to a final report has been diminished in many respects. EMLICO's attorneys have already sought removal of the Commissioner's attempt to be appointed receiver to Federal District Court (see C.A. 98-10036 U.S. District Court attached as Exhibit I). While the Bureau believes that as a threshold matter the determination of domicile of EMLICO is a question of state law, and thus not appropriate for jurisdiction in federal court, it is not clear when and how the jurisdictional and procedural issues will ultimately be resolved.

The Bureau does believe, however, that some of the issues raised in its performance review and investigation of DOI's processes warrant immediate attention. While the complexity of the legal issues currently awaiting resolution continues to grow, the Bureau believes that immediate action be taken on a number of fronts. Accordingly, the Bureau recommends the following:

1) That the House Post Audit and Oversight Committee recommend the attached corrective legislation requiring a comprehensive process for approval of redomestication of insurance companies. (Appendix I)

2) That the House Post Audit and Oversight Committee recommend the passage of the proposed legislation establishing a special commission to comprehensively evaluate the management and operation of the Division of Insurance. Such commission shall examine the operational and management deficiencies of DOI and shall examine issues such as staffing, use of consultants, hearings and financial reviews. (Appendix II)

3) In the course of its review, the Bureau found that DOI placed a heavy and unhealthy reliance on outside consultants for substantial portions of work relating to EMLICO and other regulatory matters. The Bureau noted with great concern the practice of delegating almost all of the Division's responsibilities (including response to HPAO reports and inquiries) to outside consultants. These outside consultants were then paid for by assessments to the company that was the subject of the inquiry, i.e. the "auditee", in this case EMLICO and its related entities. In the course of its review the Bureau noted several problems with this process as well as errors in billing. Accordingly, the Bureau recommends that the almost million dollars of consultant billings related to the EMLICO matter be examined by the Office of the State Auditor (see letter to State Auditor -

Appendix III) and the Office of the Attorney General (see letter to Attorney General - Appendix IV).

4) The Bureau also found that DOI delegated a large part of its day-to-day oversight responsibility to outside counsel and consultants. The Bureau recommends that its findings and analyses be forwarded to the Office of the Attorney General for a review of the process by which contracts for legal services on technical issues are approved by DOI. In the meantime, the Bureau recommends that the Committee request continued monitoring of the EMLICO activities until such time as the OSA and AG report back to the Committee with their findings.

As to the remaining legal issues currently pending in numerous courts, the Bureau believes that the issues raised are beyond the scope of its inquiry and resources. While the Bureau will be happy to monitor those events as part of its ongoing oversight of state agencies, their resolution remains outside the scope of the Bureau's mandate from the Committee.

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LINDA L. RUTHARDT, as the COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. ELECTRIC MUTUAL LIABILITY INSURANCE COMPANY, Defendant.	)	Civil Action No. 98-10036-DPW

COMMISSIONER'S MEMORANDUM
IN SUPPORT OF MOTION TO REMAND

The plaintiff Linda L. Ruthardt, as the Commissioner of Insurance for the Commonwealth of Massachusetts ("Commissioner"), brought this proceeding in the Supreme Judicial Court for Suffolk County (the "County Court") to place Electric Mutual Liability Insurance Company ("EMLICO"), a Massachusetts domestic insurer, in receivership pursuant to Mass. G.L. c. 175, § 180B. The joint liquidators ("Joint Liquidators") of Electric Mutual Liability Insurance Company, Ltd., presently a Bermuda corporation in liquidation under Bermuda law ("EMLICO, Ltd."), have filed a notice of removal with this Court pursuant to 28 U.S.C. § 1441. The Commissioner now moves for an order remanding the proceeding to the County Court on four separate grounds.

First, the Joint Liquidators who filed the notice of removal are not and do not represent the defendant and thus lack standing to remove this matter under § 1441. Second, this Court lacks jurisdiction because the Joint Liquidators are not agencies of a foreign state entitled to seek removal under § 1441(d) and there

is no diversity of citizenship that would permit removal under § 1441(a). Third, the Supreme Judicial Court's exclusive jurisdiction over this proceeding under Mass. G.L. c. 175, § 180B, is preserved by the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). Fourth, the Court should abstain from exercising jurisdiction over this State receivership proceeding, in which a State official seeks appointment as receiver of a domestic insurer pursuant to the comprehensive State regulatory scheme, in accordance with the principles articulated in Penn General Casualty Co. v. Commonwealth of Pennsylvania, 294 U.S. 189, 197, 198 (1935), and Commonwealth of Pennsylvania v. Williams, 294 U.S. 176, 182-183, 185 (1935). The Court should reject the Joint Liquidator's unprecedented effort to seek a federal determination whether a State official should be appointed receiver of a Massachusetts insurer under State law.

BACKGROUND

Pursuant to Mass. G.L. c. 175, § 3A, the plaintiff Commissioner is charged with the administration and enforcement of the insurance laws of the Commonwealth.[1] The Massachusetts statutes provide a comprehensive scheme for the rehabilitation or liquidation of troubled domestic insurers. See G.L. c. 175, §§ 6, 180A-180L; Doughty v. Underwriters at Lloyd's, London, 812 F. Supp. 13, 14-15 (D. Mass. 1993), appeal dismissed, mandamus denied, 6 F.3d 856 (1st Cir. 1993), overruled in part on other grounds, Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

[1] The Massachusetts statutes cited herein are attached as Exhibit 1.

In the event the Commissioner concludes that a domestic insurer is insolvent, the Commissioner "shall" apply to the Supreme Judicial Court for an order appointing her receiver of the insurer for purposes of rehabilitating the insurer and conserving its assets. Mass. G.L. c. 175, §§ 6 (Commissioner "shall" apply for receivership by reason of insolvency and "may" apply for other reasons), 180B (Commissioner "may" apply for receivership for reasons set forth in § 6). The Court may appoint the Commissioner as temporary and then permanent receiver and issue injunctions restraining the company from further proceeding with its business. Id., § 180B.

The defendant in this proceeding is a Massachusetts insurer with longstanding ties to the Commonwealth. EMLICO was incorporated on December 27, 1927, as a Massachusetts mutual insurance company. Verified Petition for Appointment of Receiver and Injunction ("Petition") ¶ 5. In 1995, after sixty-seven years as a Massachusetts insurer, EMLICO applied to the Commissioner for approval of three transactions by which it would reorganize its business and that of a subsidiary, Electric Insurance Company, and then "redomesticate" to Bermuda. On June 28, 1995, the Commissioner approved the transactions pursuant to G.L. c. 175, §§ 206B and 206C, and the redomestication pursuant to G.L. c. 175, § 49A. See Exhibit 2 (June 28, 1995 Memorandum and Order). On July 1, 1995, EMLICO purported to redomesticate to Bermuda and to become EMLICO, Ltd. Petition ¶ 5.

On October 20, 1995, only four months after the redomestication, EMLICO, Ltd., filed a voluntary petition for the "winding-up" of its affairs, on the ground of insolvency, with the Supreme Court of Bermuda. Petition ¶ 6. (In its June 30, 1995 Massachusetts financial statements, EMLICO had reported a net worth of over $250 million. See Petition, Ex. A). The Bermuda Court entered a judgment on July 26, 1996, including a finding that EMLICO, Ltd., is insolvent and unable to pay its debts. Petition ¶ 6. On September 12, 1996, the Bermuda Court appointed the three individuals who had been serving as the company's joint provisional liquidators as joint liquidators of EMLICO, Ltd. Exhibit 3 (September 12, 1996 Order). Those individuals hold no public office in Bermuda. Rather, they are partners in the accounting firm of Coopers & Lybrand: David E.W. Lines and Peter C.B. Mitchell of Coopers & Lybrand (Bermuda) and Christopher J. Hughes of Coopers & Lybrand (London). Id. ¶ 1. In accordance with § 171(b) and (c) of the Bermuda Companies Act 1981 ("BCA"),[2] the Bermuda Court appointed them liquidators of EMLICO, Ltd., giving effect to the previous "determination" (i.e., selection) by the sole creditor of the company (General Electric Company and its affiliates ("GE")). See id. at p. 1; Petition, Ex. B, ¶¶ 4-5. Pursuant to § 173(2) of the BCA, the Joint Liquidators are paid fees based on their hourly charges out of the assets of EMLICO, Ltd. Exhibit 3, ¶ 8.

[2] The provisions of Bermuda law cited herein are attached as Exhibit 4.

On January 5, 1998, the Supreme Judicial Court issued a decision holding that Mass. G.L. c. 175, § 49A, authorizes redomestications only to other U.S. states and that the Commissioner's approval of EMLICO's redomestication to Bermuda is invalid. In the Matter of Electric Mutual Liability Ins. Co., Ltd. (No. 1), 426 Mass. 362, 366, ___ N.E.2d ___ (1998) ("EMLICO No.1") (Exhibit 5). The Court concluded that EMLICO "never ceased to be" and "remains" a Massachusetts insurer. Id. at 367 & n.3.[3] The decision arose from the Commissioner's 1997 petition in the County Court for appointment as U.S. receiver for EMLICO, Ltd. See id. at 363. The Court held that the 1997 petition was legally insufficient, and it directed the County Court to dismiss that proceeding. Id. at 367.[4]

In light of the Supreme Judicial Court's unambiguous determination that EMLICO is a Massachusetts insurer, the Commissioner filed the Petition for a receivership of EMLICO under Mass. G.L. c. 175, § 180B, with the Supreme Judicial Court

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[3] GE had suggested that the Petition was premature because the Supreme Judicial Court had not issued its rescript in EMLICO (No. 1). See Mass. R. App. P. 23. The Commissioner accordingly filed a motion with the Supreme Judicial Court on January 8, 1998, asking that the Court immediately issue its rescript so that this action could proceed without any cloud. Over GE's opposition, the Court granted the motion and issued its rescript on January 13, 1998. Exhibit 6 (January 13, 1998 order and notice of issuance of rescript).

[4] The Supreme Judicial Court has had extensive involvement with matters concerning EMLICO: On January 5, 1998, the Court also issued a decision holding that certain reinsurers of EMLICO lacked standing to seek judicial review of the Commissioner's June 28, 1995 order. In the Matter of Electric Mutual Liability Ins. Co., Ltd. (No. 2), 426 Mass. 1007, ___ N.E.2d ___ (1998). It had earlier addressed questions of privilege arising from the anonymous disclosure of certain allegedly privileged documents concerning the circumstances of EMLICO's redomestication. In the Matter of Electric Mutual Liability Ins. Co., Ltd., 425 Mass. 419, 681 N.E.2d 838 (1997).

for Suffolk County ("County Court") on January 7, 1998. Commissioner of Insurance v. Electric Mutual Liability Insurance Company, No. 98-012. In the Petition, the Commissioner requests that the County Court appoint her Temporary Receiver of EMLICO, an insolvent Massachusetts insurer, and enter a temporary injunction restraining the company from further conducting its business and enjoining litigation or other proceedings that may interfere with the receivership proceeding. The Commissioner, as Temporary Receiver, proposes to report to the County Court within sixty days of her appointment with recommendations for further action, potentially including the conversion of the proceeding into one under G.L. c. 175, § 180C, for the liquidation of EMLICO. Petition ¶ 1.

On January 9, 1998, the Joint Liquidators filed a Notice of Removal ("Notice") with this Court.

ARGUMENT

I. THE JOINT LIQUIDATORS LACK STANDING TO REMOVE THE COMMISSIONER'S PETITION FOR A RECEIVERSHIP FOR EMLICO, A MASSACHUSETTS INSURER.

The Court should remand this proceeding to the County Court because the Joint Liquidators of EMLICO, Ltd., are not the defendant and do not represent the defendant Massachusetts insurer. The removal statute invoked by the notice of removal, 28 U.S.C. § 1441, permits removal only "by the defendant or the defendants." 28 U.S.C. § 1441(a); Shamrock Oil Corp. v. Sheets, 313 U.S. 100, 104-105 (1941). See also 28 U.S.C. § 1441(d) (concerning actions "against" foreign states); 28 U.S.C.

§ 1446(a)("[a] defendant or defendants desiring" removal shall file a notice of removal).[5] The Joint Liquidators are businessmen appointed by the Bermuda Court to liquidate a Bermuda company that is not recognized under Massachusetts law. They are not the defendant and have no standing under § 1441 to remove a receivership proceeding for a company that the Supreme Judicial Court has expressly determined to be a Massachusetts insurer.

The Joint Liquidators assert that EMLICO is EMLICO, Ltd., a Bermuda corporation. Notice ¶ 2. However, in EMLICO (No. 1), 426 Mass. at 367, the Supreme Judicial Court determined that as a matter of Massachusetts law EMLICO never left Massachusetts.[6] That company is therefore a proper defendant under § 180B, and the Bermuda Joint Liquidators are neither authorized representatives of the defendant (under § 180B, only the Commissioner may be appointed receiver of a Massachusetts insurer) nor real parties in interest. They are only representatives of a Bermuda corporation--EMLICO, Ltd.--asserting claims to EMLICO's assets, matters that will be addressed in other proceedings. The Supreme Judicial Court noted that "EMLICO's status as a Bermuda corporation is, of course, a matter

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[5] The removal statutes, like other jurisdictional statutes, are to be strictly construed, and the person seeking removal bears the burden of proof. E.g., Sirois v. Business Express, Inc., 906 F. Supp. 722, 725 (D.N.H. 1995) (citing cases).

[6] The Joint Liquidators were among the designated appellants in the proceedings before the Supreme Judicial Court leading to the EMLICO (No. 1) decision; and they submitted briefs and oral argument to the Court. See EMLICO (No. 1), 426 Mass. at 363; Exhibit 7 (June 26, 1997 Reservation and Report). They are therefore collaterally estopped from challenging the Supreme Judicial Court's determination of EMLICO's status as a Massachusetts insurer under Massachusetts law.

of Bermuda law and not before us in any event." Id. at 367 n.3. Once the Commissioner is appointed Temporary Receiver of EMLICO, she will proceed to determine how the Supreme Judicial Court's holding affects the status of EMLICO, Ltd. and its Joint Liquidators and which receiver properly may control the assets currently in Bermuda.[7] The likelihood of future proceedings does not, however, entitle the Joint Liquidators to remove a proceeding against a Massachusetts insurer. As the removal is improper, this Court lacks jurisdiction and should order remand.

II. THIS COURT LACKS JURISDICTION BECAUSE THE JOINT LIQUIDATORS ARE NOT AGENTS OF A FOREIGN STATE AND THERE IS NO DIVERSITY OF CITIZENSHIP.

The Joint Liquidators assert two grounds for removal under § 1441: (1) that they are agencies of a foreign state entitled to remove under § 1441(d), and (2) that there is diversity of citizenship under § 1332(a) permitting removal under § 1441(a). Notice ¶¶ 5, 6. Both contentions are in error, and the Court should remand the proceeding for lack of jurisdiction.

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[7] The Bermuda Joint Liquidators have obtained an ex parte order from the Bermuda Court purporting to reaffirm the existence of EMLICO, Ltd., "as a matter of Bermuda law." Exhibit 8 (January 9, 1998 Order) ¶ 1. That order is based on a sealed "Confidential Report" by one of the Joint Liquidators. Id. at p. 1; id., ¶ 3. Under Bermuda law, such ex parte orders are by their nature provisional and may be revisited on application by a party with standing. See Order 32, rule 6 of the Rules of the Bermuda Supreme Court 1985 ("The Court may set aside an order made ex parte."). Indeed, the ex parte order confirms that it is subject to revision by providing for "liberty to apply." Exhibit 8, ¶ 6. The Commissioner, once appointed Receiver of EMLICO, would have standing to request that the Bermuda Court reexamine the issue.

A. Removal Is Improper Because This Proceeding Is Not One "Against A Foreign State" Within § 1441(d).

The Joint Liquidators purport to remove this proceeding under § 1441(d), which provides in part that a civil action "against a foreign state as defined in § 1603(a) . . . may be removed by the foreign state." 28 U.S.C. § 1441(d)(emphasis added). Section 1441(d) does not apply because this proceeding is against EMLICO, a Massachusetts insurer, not a "foreign state." Even if the action were deemed to be "against" the Joint Liquidators, they are not a "foreign state" within the statute.[8]

The Commissioner has brought the petition against EMLICO, a mutual insurance company organized under the laws of Massachusetts in 1927, Petition ¶ 5, which the Supreme Judicial Court has just recently confirmed is still a Massachusetts insurer. EMLICO (No. 1), 426 Mass. at 367. EMLICO is thus a citizen of Massachusetts under § 1332(c), and it is not a "foreign state" within § 1441(d). Removal is thus improper.

The Joint Liquidators assert that they themselves are an "agency or instrumentality of a foreign state." However, even if

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[8] Section 1603(a) defines "foreign state" to include "an agency or instrumentality of a foreign state," which in turn is defined in § 1603(b) as an entity:

> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) . . . nor created under the laws of any third country.

28 U.S.C. § 1603. Section 1332(c) provides in pertinent part that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated." 28 U.S.C. § 1332(c).

this action were "against" them (see pages 6-8, above), the individuals who have been appointed Joint Liquidators of EMLICO, Ltd., are not a "foreign state" within § 1441(d). While officials of a foreign state sued for actions taken in their official capacities fall within the definition of a foreign state, see, e.g., El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996), the appointment of private individuals to act as liquidators does not transform those individuals into "organs" of a foreign state within 28 U.S.C. § 1603(b)(2).

This Court recently held that the Commissioner, as receiver of two other insolvent Massachusetts insurers, is not an arm of the State for purposes of diversity jurisdiction. Linda L. Ruthardt, Commissioner of Insurance, as Permanent Receiver of American Mutual Liability Insurance Company and American Mutual Liability Insurance Company of Boston v. Munich American Reinsurance Company, No. 97-11363-DPW (September 12, 1997). If a State official appointed as receiver in her official capacity is not an arm of the State for purposes of diversity jurisdiction, e.g., Crawford v. Employers Reins. Corp., 896 F. Supp. 1101, 1102 (W.D. Okl. 1995); North Carolina ex rel. Long v. Alexander & Alexander, 711 F. Supp. 257, 262-264 (E.D.N.C. 1989), private persons working for a fee have a far weaker claim to sovereignty.

The Joint Liquidators will presumably rely on Fabe v. Aneco Reins. Underwriting Ltd., 784 F. Supp. 448 (S.D. Ohio 1991), to support their claim to be an "agency" of a foreign state. That case has no bearing here, however, because one of the Bermuda

liquidators there was Bermuda's Official Receiver and Registrar of Companies, a "public officer" under the Bermuda Constitution Order 1968. Id. at 449. See Bermuda Constitution Order 1968 ("BCO") § 102(1) ("public officer means the holder of any public office and includes a person appointed to act in any public office"); BCA § 3 (the "'Official Receiver' . . . shall be [a] public officer"). The Official Receiver is appointed by the Governor of Bermuda, BCO § 82(1), and works for and is paid by the Bermuda Government when acting as a liquidator; he receives no renumeration out of the assets of the estate. See BCA § 173(2). The Official Receiver need not be appointed liquidator. See BCA §§ 170(2), 171(d), 172. The liquidators here hold no public office. They are accountants previously selected by the sole creditor of the company (GE), see Exhibit 3 at p. 1; id., ¶ 1; BCA § 171(b) (the Bermuda Court giving effect to that selection under BCA § 171(c)), who are paid fees for their services out of the estate, see Exhibit 3, ¶ 8; BCA § 173(2).

B. **There Is No Diversity Of Citizenship.**

The Joint Liquidators also contend that removal is proper under § 1441(a) because this proceeding falls within the Court's diversity jurisdiction. This assertion is wrong for two separate reasons. First, as noted above, the defendant in the case is a Massachusetts insurer. Petition ¶ 4. There is thus no diversity between the Commissioner (who the Joint Liquidators erroneously view as a Massachusetts citizen, Notice ¶ 1) and the defendant. See 28 U.S.C. § 1332(c).

Second, as the plaintiff is a State official bringing suit in her official capacity, Petition ¶ 1, there can be no diversity jurisdiction. It is well established that a State is not a citizen of itself for purposes of diversity jurisdiction, see Moor v. County of Alemeda, 411 U.S. 693, 717 (1973); University of Rhode Island v. A.W. Chesterton Co., 2 F.3d 1200, 1202 (1st Cir. 1993), and that State officials in their official capacity are similarly not citizens for diversity purposes. See Northeast Federal Credit Union v. Neves, 837 F.2d 531, 533 (1st Cir. 1988). Since the plaintiff Commissioner in her official capacity is not a "citizen" of any State for purposes of diversity jurisdiction, there is no diversity to support removal under § 1441(a).

III. STATE INSURER RECEIVERSHIP PROCEEDINGS MAY NOT BE REMOVED TO FEDERAL COURT BECAUSE THE MCCARRAN-FERGUSON ACT DEPRIVES THE COURT OF JURISDICTION.

The McCarran-Ferguson Act preserves the exclusive jurisdiction of the Supreme Judicial Court over the Commissioner's Petition to place a Massachusetts insurer in receivership, a State proceeding at the very heart of State regulation of insurance. Section 180B requires the Commissioner to "institute a rehabilitation proceeding . . . by making application to the supreme judicial court for [her] appointment as receiver." Mass. G.L. c. 175, § 180B. See also id., §§ 6, 180C (requiring the filing of other insurer receiverships in the Supreme Judicial Court).[9] Because § 180B was enacted "for the

[9] Insurer receivership proceedings are filed in the County Court, which is the single justice session of the Supreme Judicial Court.

purpose of regulating the business of insurance," under the McCarran-Ferguson Act, it is not preempted by any federal statute that does not "specifically relate[] to the business of insurance." 15 U.S.C. § 1012(b). The federal statutes on which the Joint Liquidators premise removal do not specifically relate to the business of insurance, and they do not strip the Supreme Judicial Court of the jurisdiction vested in it by § 180B.[10]

The McCarran-Ferguson Act reverses the normal preemption of state law by federal law, and instructs courts not to construe any federal statute to preempt a state statute relating to the business of insurance, unless that federal statute also specifically relates to the business of insurance. Barnett Bank v. Nelson, 517 U.S. 25, 116 S. Ct. 1103, 1106, 1111 (1996); United States Dep't of Treasury v. Fabe, 508 U.S. 491, 499-500 (1993). The Act establishes a three-part test for determining if a federal statute improperly intrudes upon a state's regulation of insurance. First, would application of the federal statute invalidate, impair, or supersede state law? Second, was the state law at issue enacted for the purpose of regulating the business of insurance? Third, does the federal statute not specifically relate to the business of insurance? Fabe, 508 U.S.

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[10] See Transit Casualty Co. v. Certain Underwriters at Lloyd's of London, 119 F.3d 619, 622 (8th Cir. 1997) (dismissing appeal where District Court remanded for lack of jurisdiction on the ground that, under McCarran-Ferguson, a Missouri insurance statute was not displaced by the Federal Arbitration Act or the Convention on Foreign Arbitral Awards), petition for cert. filed, 66 USLW 3298 (Oct. 8, 1997); U.S. Financial Corp. v. Warfield, 839 F. Supp. 684, 687-690 (D. Ariz. 1993) (under McCarran-Ferguson, state court injunction divests federal court of jurisdiction).

at 500-501. Under this multi-part test, the Supreme Judicial Court properly has jurisdiction over the Petition.

First, the Court's exercise of jurisdiction over the Petition would supersede the Massachusetts insurance receivership statute, which vests jurisdiction over applications for receiverships of Massachusetts insurers solely in the Massachusetts Supreme Judicial Court. Mass. G.L. c. 175, §§ 6, 180B, 180C. If the federal statutes authorized removal, they would negate the exclusive jurisdictional grant in § 180B. This would potentially produce an unprecedented result: federal court appointment and supervision of a State official as receiver of a Massachusetts insurer pursuant to a State regulatory scheme.

Second, the jurisdictional provisions of § 180B were enacted by the Massachusetts Legislature for the purpose of regulating the business of insurance. The "broad category" of laws enacted for this purpose consists of laws with the aim of "adjusting, managing, or controlling the business of insurance." Fabe, 508 U.S. at 505. It includes laws directed to protecting the relationship of the policyholder and the insurer and the performance of the insurance contract. Barnett, 116 S. Ct. at 1112; Fabe, 508 U.S. at 505. State insurance receivership laws, especially those directed to "ensur[ing] that, if possible, policyholders ultimately will receive payment on their claims," fall within this category. Id. at 506.

Section 180B is clearly such a law. As the Supreme Court held with respect to the administrative priority statute in Fabe,

the provision of § 180B vesting jurisdiction over insurer receiverships in State court--the Supreme Judicial Court--"is reasonably necessary to further the goal of protecting policyholders" because, without such a provision, the receivership "could not even commence." Fabe, 508 U.S. at 509; see Garcia v. Island Program Designer, Inc., 4 F.3d 57, 61 (1st Cir. 1993). As receiver, the Commissioner is to attempt to revitalize and rehabilitate the insurer or, if necessary, convert the proceeding into a liquidation. See Mass. G.L. c. 175, §§ 180B, 180C.

The provisions vesting jurisdiction over insurer rehabilitation and liquidation proceedings in the Supreme Judicial Court are an important part of the statutory scheme to protect the interests of policyholders. By vesting jurisdiction in one court, the statute insures a consistent, unified approach and a continuing, detailed oversight of insurer receiverships by a court which over time has developed expertise.[11] Cf. Allstate Ins. Co. v. Sabbagh, 603 F.2d 228, 233 (1st Cir. 1979)(exclusive jurisdiction and historic experience of Supreme Judicial Court regarding auto insurance ratemaking warrants abstention). As a key component of the Massachusetts statutory plan for control

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[11] Numerous insurer receiverships have been filed in the County Court and assigned to particular justices since 1989. Commissioner of Insurance v. American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston, No. 89-23 (Fried, J.); Commissioner of Insurance v. Monarch Life Insurance Company, No. 91-217 (Wilkins, J.); Commissioner of Insurance v. Cooperants Mutual Life Insurance Society, No. 92-372 (Lynch, J.); Commissioner of Insurance v. Attleboro Mutual Insurance Company, No. 92-376 (Abrams, J.); Commissioner of Insurance v. Monarch Life Insurance Company, No. 94-268 (Wilkins, C.J.); Commissioner of Insurance v. Abington Mutual Insurance Company, No. 95-278 (Lynch, J.).

over troubled insurers for the benefit of their policyholders, the jurisdictional provisions were clearly enacted for the purpose of regulating the business of insurance.

Third, none of the statutes upon which the Joint Liquidators base removal and the jurisdiction of this Court specifically relates to the business of insurance. To "specifically relate" to the business of insurance, a federal statute must make some explicit, particular or definite reference to insurance. Barnett, 116 S. Ct. at 1111. A statute that uses "general language that does not appear to 'specifically relate' to insurance" is subject to the anti-preemption provisions of McCarran-Ferguson. Id. at 1113.

The Joint Liquidators have relied upon 28 U.S.C. §§ 1332(a), 1441(a), 1441(d), 1603(a), and 1446. None of these statutes makes any specific reference to the business of insurance. Section 1332(a) merely provides for diversity jurisdiction.[12] Section 1441(a) provides for removal of civil actions but it does not refer to insurance or even receiverships. Indeed, by its very terms, it allows for exceptions such as preemption by the McCarran-Ferguson Act by providing for removal "[e]xcept as otherwise expressly provided by Act of Congress." 28 U.S.C. § 1441(a). Section 1441(d) allows for removal of actions brought against foreign states, defined by § 1603(a); neither provision

[12] The only possible reference to the business of insurance is the related provision of § 1332(c)(1) concerning citizenship in direct actions against the insurer under liability insurance policies. That provision has no bearing on this receivership proceeding.

makes any reference to insurance. Section 1446 merely provides procedures for removal. The Court thus should order remand.

IV. EVEN IF THE PROCEEDING WERE PROPERLY REMOVED, THE COURT SHOULD ABSTAIN FROM EXERCISING JURISDICTION OVER A STATE PETITION TO ESTABLISH AN INSURER RECEIVERSHIP.

By removing this action, the Joint Liquidators seek to have a federal court determine whether a State official should be appointed as receiver of a domestic insurer pursuant to a comprehensive State regulatory scheme. This Court should abstain from such an extraordinary interference with State proceedings. The Supreme Court has recently confirmed that a federal court may dismiss or remand a case seeking discretionary relief "if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 116 S.Ct. 1712, 1726 (1996)(quoting New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989)(internal quotations omitted)). See id., 116 S.Ct. at 1723. The Commissioner's petition seeks equitable relief (appointment of a receiver and injunctions), see Commonwealth of Pennsylvania v. Williams, 294 U.S. 176, 182 (1935), and the Court thus may abstain.

Receivership proceedings by the State insurance regulator are at the heart of State efforts to protect policyholders and the public from the problems presented by troubled domestic insurers. Massachusetts has addressed these concerns by enacting its own version of the Uniform Insurers Insolvency Act as Mass.

G.L. c. 175, §§ 180A through 180L. See Commissioner of Ins. v. Equity General Ins. Co., 346 Mass. 233, 236, 191 N.E.2d 139, 141 (1963). The Massachusetts Legislature has emphasized the importance of a uniform policy with respect to the rehabilitation and liquidation of domestic insurers by requiring that the Commissioner be appointed receiver and centralizing all insurer receiverships in the Supreme Judicial Court. See Mass. G.L. c. 175, §§ 6, 180B, 180C; cf. Allstate, 603 F.2d at 233.

The adjudication of insurer receivership proceedings in a federal forum necessarily disrupts State efforts to establish coherent policy in this important area by transferring supervisory authority over the proceeding from the designated State court.[13] The Supreme Court recognized the strength of these concerns, even in a pre-McCarran-Ferguson context, in Commonwealth of Pennsylvania v. Williams, 294 U.S. at 182-183, and Penn General Casualty Co. v. Commonwealth of Pennsylvania, 294 U.S. 189, 197 (1935). In Williams, the Court held that even though the federal court had jurisdiction of a shareholder's petition for a receivership of a building and loan association, "the discretion of the District Court, invoked by the petition of the commonwealth [seeking to intervene and an order turning the assets over to the state officer] should have been exercised to

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[13] The removal of the State receivership proceeding itself distinguishes this case from the numerous cases, including Quackenbush and Ruthardt v. Munich American, in which federal courts have considered whether "federal court decision-making of the kind that exists alongside state insurance liquidation proceedings so significantly disrupts state regulatory frameworks to call for abstention." Fragoso v. Lopez, 991 F. 2d 878, 884 (1st Cir. 1993)(emphasis added).

relinquish the jurisdiction in favor of the statutory administration of the corporate assets by the state officer." Williams, 294 U.S. at 183. The Court held that "[i]t is in the public interest" that federal courts exercise their discretionary power "with proper regard for the rightful independence of state governments in carrying out their domestic policy." Id. at 185. It also noted the "long accepted practice" for federal courts to relinquish jurisdiction in favor of state courts "where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state." Id.[14] The Court applied these principles to competing liquidation proceedings for an insurance company in Penn General. Although the District Court had acquired jurisdiction, the Court held that it should "relinquish jurisdiction in favor of administration by the state officer." Penn General, 294 U.S. at 197.

The principles of federal deference to state regulation in the insurance area that underlie the Penn General decision were subsequently confirmed by Congress in the McCarran-Ferguson Act and the 1978 Bankruptcy Code. In the 1945 McCarran-Ferguson Act, Congress "declare[d] that the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. Congress then provided that "[t]he business of insurance, and every person engaged therein,

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[14] See In re English Seafood (USA), Inc., 743 F. Supp. 281, 289 (D. Del. 1990) (remanding petition for corporate dissolution on abstention grounds); Alkire v. Interstate Theatres Corp., 379 F. Supp. 1210, 1215 (D. Mass. 1974)(dismissing petition for corporate dissolution).

shall be subject to the laws of the several States which relate to the regulation or taxation of such business," 15 U.S.C. § 1012(a), and it enacted the reverse pre-emption doctrine discussed in the preceding section, 15 U.S.C. § 1012(b). In § 109 of the 1978 Bankruptcy Code, Congress continued the longstanding exclusion of domestic insurers from the bankruptcy laws. 11 U.S.C. § 109(b), (d). Congress has thus determined that there are no federal interests in jurisdiction over insurer receiverships, and "the State's interests are paramount." Quackenbush, 116 S.Ct. at 1726.

CONCLUSION

For the foregoing reasons, the Court should enter an order (i) remanding this proceeding to the County Court for lack of jurisdiction or, in the alternative, in the exercise of the Court's discretion, and (ii) requiring the Joint Liquidators to pay to the Commissioner the just costs and actual expenses, including attorney's fees, incurred as a result of the removal.

Respectfully submitted,
LINDA L. RUTHARDT
COMMISSIONER OF INSURANCE
By her attorneys,
Scott Harshbarger
Attorney General

J. David Leslie (BBO #294820)
Special Ass't Attorney General
Eric A. Smith (BBO #546244)
Rackemann, Sawyer & Brewster
One Financial Center
Boston, MA 02111
(617) 542-2300

Dated: January 20, 1998

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for ~~each other party~~ the Joint Liquidators ~~by mail~~ (by hand) on 1/20/98.

The Commonwealth of Massachusetts

IN THE YEAR ONE THOUSAND NINE HUNDRED AND NINETY- EIGHT

AN ACT

RELATIVE TO THE HEARING AND NOTICE REQUIREMENTS FOR REORGANIZATIONS AND REDOMESTICATIONS OF INSURANCE COMPANIES

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. MGL c.175 is hereby amended by striking out the second paragraph in section 49A and inserting the following new paragraphs:-

Any domestic insurer may after public hearing and approval by the Commissioner transfer its domicile to any other state of the United States in which it is admitted to transact the business of insurance and upon such transfer shall cease to be a domestic insurer and shall if qualified be admitted to the Commonwealth as a foreign insurer. The Commissioner shall not approve a redomestication to another state of the United States unless and until the applicant has been admitted to transact business in the transfer state for a period of at least three months.

Any domestic insurer that receives approval by the Commissioner to redomesticate to another state shall be required to post a bond with the Commissioner. Such bond shall be in the amount of twenty percent of posted loss reserves submitted for

the last annual filing submitted prior to the date of application to redomesticate. The bond shall remain in effect for one year after the redomestication to another state has been approved.

All property and casualty insurers shall include with their annual filings with the Commissioner their most recent estimate of losses as well as a listing of all hazardous waste sites, federal and state, where the estimated loss exceeds one million dollars. Such estimates shall remain confidential and shall not be made public by the Commissioner without consent of the company.

SECTION 2. MGL c.175, s.206B is hereby amended by striking out paragraph two in Subsection D and inserting in place thereof the following:

The Commissioner shall be required to hold a public hearing in accord with clause 1 and shall give notice to the person filing the statement, all reinsurers, stockholders, policyholders and any other interested parties by publication in at least three newspapers, one of which shall have statewide circulation.

The Commonwealth of Massachusetts

IN THE YEAR ONE THOUSAND NINE HUNDRED AND NINETY-EIGHT

AN ACT

RELATIVE TO A SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF STUDY AND EVALUATION OF THE MANAGEMENT AND OPERATION OF THE DIVISION OF INSURANCE

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The Commission shall evaluate the Division with respect to all current operations and shall include but not be limited to the following: staffing; use and compensation of experts and outside consultants; content and conduct of financial examinations; DOI's current management structure and reporting requirements; the Commissioner's delegation of authority; industry surveillance; use of working groups; and public hearings/notices.

The Commission shall consist of nine members, to be appointed as follows: one member appointed by the Governor, one by the Secretary of State, one by the State Auditor, and one by the Attorney General. The Speaker of the House and the Senate President shall also have one appointment each.

In addition, the Governor shall further appoint the following members: two members from the Insurance industry and a consumer.

NOTE. — Use ONE side of paper ONLY. DOUBLE SPACE. Insert additional leaves, if necessary.

The Commission shall submit to the Governor, Speaker, and Senate President a report detailing preliminary findings six months from the effective date of the creation of the Commission. The final report will be submitted not later than one year from the effective date of the creation of the Commission.

The Commission is hereby authorized to appoint an Executive Director who will hire suitable staff. The Commission may be located in a state owned facility, and is authorized to acquire equipment, furniture and supplies as may be necessary.

An appropriation of $250,000 is hereby authorized for the work of the Commission.

The Commonwealth of Massachusetts
HOUSE POST AUDIT AND OVERSIGHT BUREAU
ROOM 146, STATE HOUSE
BOSTON, MA 02133-1053

JAMES H. FAGAN
CHAIRMAN
COMMITTEE ON
POST AUDIT AND OVERSIGHT

THOMAS W. HAMMOND, JR.
DIRECTOR
(617) 722-2417

March 11, 1998

Robert Powilatis
Chief of Audit Operations
Office of the State Auditor
1 Ashburton Place, Room 1819
Boston, MA 02108

Re: Billings and Charges for EMLICO and EIC Under MGL c.175, s.4

Dear Mr. Powilatis,

Per our prior discussions, please find enclosed the House Post Audit Committee materials and copies of invoices relative to billings and contracts regarding the above referenced matter.

If you have any questions, please feel free to contact me.

Sincerely,

Thomas W. Hammond, Jr.
Director and General Counsel

TWH/lg
Enclosure

The Commonwealth of Massachusetts
HOUSE POST AUDIT AND OVERSIGHT BUREAU
ROOM 146, STATE HOUSE
BOSTON, MA 02133-1053

JAMES H. FAGAN
CHAIRMAN
COMMITTEE ON
POST AUDIT AND OVERSIGHT

THOMAS W. HAMMOND, JR.
DIRECTOR
(617) 722-2417

March 11, 1998

Mr. Doug Wilkins
First Assistant Attorney General
Office of the Attorney General
1 Ashburton Place, Room 2001
Boston, MA 02108

Re: Billings and Charges for EMLICO and EIC Under MGL c.175, s.4

Dear Mr. Wilkins,

Please find enclosed the House Post Audit Committee materials and copies of invoices relative to billings and contracts regarding the above referenced matter.

If you have any questions, please feel free to contact me.

Sincerely,

Thomas W. Hammond, Jr.
Director and General Counsel

TWH/lg
Enclosure